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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KARLA MARICELA PALACIO SEPULVEDA, Defendant.	Criminal Case No. 07-CR-3394 IEG Date: April 28, 2008 Time: 2:00 p.m. **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(A) PRECLUDE 404(B) EVIDENCE;** **(B) PRECLUDE 403 EVIDENCE;** **(C) PRECLUDE 609 EVIDENCE; and** **(D) LEAVE TO FILE ADDITIONAL MOTIONS** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES**

COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Stewart M. Young, Assistant United States Attorney, and hereby files its Response in Opposition to Defendant's Motions. These Responses are based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On December 18, 2007, a federal grand jury in the Southern District of California returned a two-count Indictment charging defendant Karla Maricela Palacio Sepulveda ("Defendant") with importing approximately 38.62 kilograms (84.96 pounds) of marijuana into the United States in violation of Title 21, United States Code, §§ 952 and 960; and possessing that marijuana with the intent to distribute, in violation of Title 21, United States Code, § 841(a)(1). Defendant was arraigned on the Indictment on December 18, 2007, and pleaded not guilty.

II

STATEMENT OF FACTS

A. PRIMARY INSPECTION

On December 5, 2007, at approximately 3:56 p.m., Defendant entered the Calexico West, California Port of Entry ("POE") as the driver and sole occupant of a 1996 Pontiac Bonneville, bearing Baja/Mexico license plate number BCU3214. At primary inspection, Customs and Border Protection ("CBP") Officer Alexandro Felix contacted the Defendant, who was identified by her Border Crossing Card. Defendant gave a negative declaration and stated that she had owned the vehicle for one year. She stated that she was heading toward Calexico, California. While speaking to Defendant, CBP Officer Felix did not notice any signs of nervousness, but he did smell what appeared to be soap and marijuana around the area of the glove compartment. He referred the vehicle to secondary for further inspection.

B. SECONDARY INSPECTION

In secondary inspection, CBP Officer Carmen Estrada contacted Defendant and received a negative declaration. Defendant stated to Officer Estrada that she was heading to Calexico, California, to buy some shoes. She further stated that after buying shoes, she would drive to Heber, California to visit her aunt. While speaking with Defendant, Officer Estrada did not observe any signs of nervousness, but did notice shiny packages behind the glove compartment and the inside of the dashboard. Officer Estrada detained Defendant in the vehicle secondary office.

CBP officers then removed 21 packages from a compartment located inside the dashboard of the vehicle. One of the packages was probed and field-tested positive for marijuana. A total of 21 packages were removed with an aggregate weight of 38.62 kilograms.

C. CHEMICAL EVALUATION OF THE DRUGS SEIZED

A forensic chemist employed by the Drug Enforcement Administration and assigned to the Southwest Regional Laboratory in this district conducted a series of evaluations on the seized drugs and concluded that the substance tested positive for marijuana.

D. RELATED EVENT

On May 4, 2005, Oscar Herrera-Martinez applied for admission to the Calexico West, California Port of Entry driving a 1989 Dodge Grand Caravan bearing Baja Mexico license plate number BCT4879. Herrera stated at primary that the vehicle belonged to his female cousin "Karla Palacio Sepulveda." CBP Officer Garcia viewed the registration of this vehicle, and saw that it listed "Karla Maricela Palacio Sepulveda" as the owner. Upon noticing that the gas tank sounded solid, a pproximately 29.26 kilograms of marijuana were found concealed in the gas tank of that vehicle.

Herrera-Martinez and his passenger, Alberto Aguilara-Garcia, both pleaded guilty to an information charging them with importation of marijuana and aiding and abetting. They were sentenced to 6 months custody and 2 years supervised release by Judge Gordon Thompson in Case No. 05-CR-956-GT.

Discovery as to this event was produced to defendant on April 21, 2008. The Government noted to Defendant on April 22, 2008, that it intended to introduce this evidence to demonstrate knowledge, absence of accident or mistake on the part of Defendant.

III

POINTS AND AUTHORITIES

A. THE GOVERNMENT DOES NOT SEEK TO ADMIT ANY PRIOR CONVICTIONS UNDER EITHER RULES 404(B) or 609

Defendant argues that under Rule 404(b) or Rule 609, the Government should not be allowed to admit any prior convictions. The Government is not aware of any prior convictions of Ms. Palacio Sepulveda, and will not seek to admit any of these prior convictions (if they exist) during its case-in-chief. Accordingly, any argument to preclude these convictions as prior bad acts are moot. This applies under both Rule 404(b) and Rule 609.

The Government has provided Rule 404(b) notice to Defendant on April 22, 2008, regarding her prior act of being the registered owner of a vehicle found with 29.26 kilograms of marijuana on May 4, 2005. In theses notices and in discovery, the United States provided sufficient information to alert defense counsel to the general nature of the evidence to be offered at trial and thereby avoid surprise.

1. "404(b)" Analysis

Evidence of other crimes, wrongs, or acts is not admissible under Rule 404(b) to prove the character of the defendant in order to show action in conformity therewith. However, evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) so long as its introduction is for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 404(b) is "an inclusionary rule" under which evidence is inadmissable "only when it proves nothing but the defendant's criminal propensities." United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), cert denied, 454 U.S. 970 (1981), overruled on other grounds, United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Evidence of other acts is admissible under Rule 404(b) if:

(1) the evidence tends to prove a material element of the offense charged;

(2) the prior act is not too remote in time;

(3) the evidence is sufficient to support a finding that the defendant committed the other act; and

(4) (where knowledge and intent are at issue) the act is similar to the offense charged.

United States v. Plancarte-Alvarez, 366 F.3d 1058, 1062 (9th Cir. 2004) (citing United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994)); United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir. 1993) (evaluating admissibility under Rule 404(b) for materiality, similarity, sufficiency, and temporal proximity).

A. Defendant Being the Registered Owner of 2005 Vehicle Is Material to the Elements of the Offense

Here, Defendant was the registered owner of a vehicle where marijuana was smuggled into the country. The registration documents for the vehicle demonstrated that defendant was that registered owner. Such a fact is material to the issue of whether she knowingly and intentionally imported marijuana into the United States from Mexico and knowingly possessed marijuana with the intent to distribute on this occasion. See United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985) (other act evidence may be introduced if the Government establishes its relevance to an actual issue in the case). Indeed, the Ninth Circuit has upheld the admission of other act evidence to refute an "innocent dupe" defense. See United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991) (subsequent act of importing 30 pounds of marijuana was relevant to show defendant was not "duped" into initially smuggling cocaine into the United States), cert. denied, 501 U.S. 1234, 111 S.Ct. 2861 (1991).

B. Prior Act is Not too Remote in Time

Here, the "other act" evidence is not too remote in time. There is no bright-line rule requiring the Court to exclude other act evidence after a certain period of time has elapsed. See United States v. Brown, 880 F.2d 1012, 1015 n. 3 (9th Cir. 1989). Proximity in time "is not a prerequisite having independent force." United States v. Ramirez-Jimenez, 967 F.2d 1321, 1326 (9th Cir. 1992). It should be considered in the context of all the relevant facts and circumstances in a given case. Id.; see also United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (upholding admission of "other act" that occurred 13 years before charged crime); and United States v. Ross, 886 F.2d 264, 267 (9th Cir. 1989) (same). As such, Defendant's act of being the registered owner of a vehicle stopped with 29 kilograms of marijuana in 2005 is sufficiently recent for the purposes of Rule 404(b).

C. There is Sufficient Evidence of Prior Act

Here, the United States will present sufficient evidence of Defendant's act of being the registered owner of the 2005 vehicle through the testimony of ICE Special Agent John Kapitzke. Agent Kapitzke investigated the 2005 case and viewed documents associated with the vehicle. He also conducted the interviews of the defendants associated with that vehicle load (those post-Miranda statements will not be presented due to Government's acquaintance with United States v. Crawford). Other act evidence under Rule 404(b) should be admitted if "there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." Huddleston v. United States, 485 U.S. 681, 685 (1988). The testimony of a single witness is sufficient to satisfy the low-threshold for purposes of Rule 404(b). See United States v. Dhingra, 371 F.3d 557, 566-57 (9th Cir. 2004) (citing United States v. Hinton, 31 F.3d 817, 823 (9th Cir. 1994)).

D. **Knowledge, Absence of Accident or Mistake**

The Government does not intend to offer the 2005 incident to demonstrate any propensity of defendant to commit the instant offense. Rather, the Government anticipates that Defendant will place her knowledge as to the drugs in the vehicle in the instant offense at issue during trial. Defendant was the registered owner of the vehicle loaded with marijuana in December 2007, and Defendant was the registered owner of the vehicle loaded with marijuana in May 2005. Such evidence is used by the Government to rebut any argument regarding mistake, accident, or a lack of knowledge by the Defendant. Indeed, if Defendant's registered vehicle was found to have drugs in 2005, Defendant clearly was on notice about drugs "accidentally" or "mistakenly" being in her vehicle in 2007. Accordingly, the Government requests the Court to not preclude such 404(b) evidence from being presented in its case-in-chief. If the Court requires the Government not to use this evidence in its case-in-chief for any reason, the Government respectfully requests that the Court allow this evidence to be used in its rebuttal case if Defendant puts her knowledge of the December 2007 drugs at issue during her case-in-chief.

B. NO OPPOSITION FOR LEAVE TO FILE FURTHER MOTIONS

The Government does not oppose Defendant's request to file further motions, as long as this request applies equally to the Government.

C. RECIPROCAL DISCOVERY

To date, Defendant has produced no reciprocal discovery to include any photographs that Defendant intends to introduce at trial. The United States respectfully requests that Defendant comply with Rules 12.2 and 16(b) of the Federal Rules of Criminal Procedure, as well as Rule 26.2 which requires the production of prior statements of all witnesses, except for those of Defendant. Accordingly, the United States intends to object at trial and ask this Court to exclude any evidence at trial which has not been provided to the United States.

IV

CONCLUSION

For the above stated reasons, the United States respectfully requests that the Court .

DATED: August 21, 2007

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Stewart M. Young
STEWART M. YOUNG
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Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KARLA MARICELA PALACIO SEPULVEDA, Defendant.	Case No. 07-CR-3394 IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Stewart M. Young, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions to be served on the following by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Marc X. Carlos, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2008.

s/ Stewart M. Young
STEWART M. YOUNG